DATO' JAFFAR MOHD ALI & ANOR

v.

JASTERA BHD & ORS

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[CIVIL NO: MT3-22-438-99]
29 OCTOBER 1999

CIVIL PROCEDURE: *Injunction - Interim injunction - Whether serious questions to be tried - Whether balance of convenience and justice lies in favour of granting injunction*

COMPANY LAW: *Directors - Removal - Removal due to continued absence from directors' meetings - Whether in accordance with memorandum and articles of association - Whether justified*

The plaintiffs sought the following interim injunctions, *inter alia*: (i) restraining defendants no. 2 to 6 from commencing or proceeding with board of directors meetings; (ii) restraining defendant no. 6 from acting as a director of defendant no. 1; and (iii) restraining defendants no. 2 to 6 from excluding plaintiff no. 2 and one Tan from acting as directors of defendant no. 1.

The defendant no. 1 is a public listed company. A board of directors meeting (BOD) was held, in which plaintiffs no. 1 and 2 did not attend, whilst defendants no. 2 to 5 attended and passed, *inter alia*, two resolutions. Firstly, as plaintiff no. 2 and another director Tan had not attended the last ten and seven successive directors' meetings respectively their office as directors of defendant no. 1 was to be vacated in accordance to art. 91(g) of the memorandum and articles of association. Secondly, defendant no. 6 was appointed as director and executive director of defendant no. 1 with immediate effect.

The plaintiffs claimed that the BOD meeting was unlawful and irregular and that the minutes of the meeting did not reflect the matters discussed and so was unlawful, and that the removal of the plaintiff no. 2 and Tan was contrary to s. 128(8) of the Companies Act 1965 and was therefore illegal. Furthermore they argued the appointment of defendant no. 6 was null and void and the balance of convenience was in their favour.

The defendants claimed that an interlocutory injunctive remedy sought by the plaintiffs would be equivalent to giving final judgment and would have the practical effect of putting an end to trial without permitting the defendants to proceed to trial. They further submitted that the BOD meeting and the minutes were lawful and regular and that plaintiff no. 2 and Tan were not removed, but their office as directors were deemed vacant by virtue of their successive absence. The appointment of defendant no. 6 was in accordance to art. 87 of the memorandum and articles of association.

Held:

[1] There are *bona fide* serious questions to be tried *ie*, whether the BOD meeting was lawful or regular; whether plaintiff no. 2 and Tan were removed or whether their office as directors fell vacant; whether such removal or vacancy contravenes s. 128(8) of the Companies Act 1965; whether the appointment of defendant no. 6 was null and void; and, whether the minutes of the BOD were not reflective of the meeting and illegal.

[2] The judge should go beyond a mere consideration of balance of convenience and have due regard to the balance of justice which is required by the justice of the case. Furthermore, a judge in dealing with an application for an interlocutory injunction should consider an additional element *ie*, the risk of injustice and that in doing so the judge should do his best to avoid injustice.

[3] The first item of injunctive relief would have an effect that the defendants no. 2 to 6 who are directors of defendant no.1 are not to conduct directors' meetings. This runs counter to all principles of company law. Part V of the Companies Act 1965 provides for the management and administration of a company and division 2 thereof establishes, *inter alia*, the mechanism for the appointment of directors and their statutory duties. The articles of association of a company do provide for regulations of such meeting. Furthermore, under s. 132 of the Companies Act 1965, directors are fiduciaries who must act in the best interest of the company. In the circumstances, the justice of the case is in favour of refusing the injunction.

[4] The second item purporting to restrain defendant no. 6 from acting as director was agreed to by the vast majority of the directors of defendant no. 1. That being the case the justice of the case would favour the preservation of the *status quo* which is the continued exercise by defendant no. 6 as a director of defendant no. 1.

[5] The third item was to restrain plaintiff no. 2 and Tan from acting as directors. Tan is not a party to this suit therefore no injunctive relief will be considered in his favour. In the case of plaintiff no. 2, his absence from ten successive directors' meetings no doubt has given rise to the irresistible reference that his interest in or concern for the affairs of defendant no. 1 as a company is sliding downhill, to a level which is lacklustre, lackadaisical, or lukewarm. It is therefore natural for the BOD meeting to have resolved that the office of plaintiff no. 2 as a director of defendant no. 1 shall be deemed vacant and was indeed vacated. The *status quo* is that plaintiff no. 2 is for the time being no longer a director of defendant no. 1.

[Plaintiff's application dismissed.]

Case(s) referred to:

American Cyanamid Co. v. Ethicon Ltd [1975] AC 396 ***(refd)***
Cambridge Nutrition Ltd v. British Broadcasting Corp [1990] 3 All ER 523 ***(refd)***
Cayne & Anor v. Global Natural Resources Plc [1984] 1 All ER 225 ***(refd)***
Interkol (M) Sdn Bhd v. Bandar Utama City Promenade Sdn Bhd & Anor [1999] 5 CLJ 376 ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor Abdullah [1995] 1 CLJ 293 ***(refd)***
Leisure Farm Corp Sdn Bhd v. Syarikat Kemajuan Kim Yon Sdn Bhd [1990] 1 MLJ 44 ***(refd)***
NWL Ltd v. Nelson & Anor [1979] 3 All ER 614 ***(refd)***
Salmon v. Quin & Axtents Ltd [1909] AC 442 ***(refd)***
See Teow Chuan & Anor v. Yam Tunku Nadzaruddin Uddin Ibni Tuanku Jaafar & Ors [1999] 7 CLJ 195 ***(refd)***
Thomas M Heysek v. Boyden World Corp [1989] 1 MLJ 219 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 33(1), 128(8), 132
Rules of the High Court 1980, O. 29

For the defendent - YN Ngeow; M/s Loke & Assoc
For the plaintiff - Kulasegaran (Aneeta Kula); M/s Ranjit Thomas Kula

Reported by Sherin Kunhibava

JUDGMENT

Low Hop Bing J:

Application

This is the plaintiffs' *inter parte* application by way of summons in chambers in encl. (3), seeking the following orders:

1. an interim injunction restraining defendants no. 2-6, whether by themselves, their servants or agents or howsoever otherwise, until a further order, from doing the following acts or any of them, that is to say, commencing or proceeding with the Board of Directors Meeting at 10.30am on 29 April 1999, or on any other dates at No. 31, Jalan SS 15/4E, 47500 Subang Jaya, Selangor Darul Ehsan or at any other place;

2. an interim injunction restraining defendant no. 6 from acting as a director of defendant no. 1, until after the trial of this action, or until further order;

3. an interim injunction restraining defendants No. 2 to 6 from excluding plaintiff no. 2 and one Tan Seng Chai ("Tan") from acting as directors of defendant no. 1, until after the trial of this action or until further order.

Brief Facts Of The Case

So far as relevant to the terms of the plaintiffs' application in encl. (3), the facts of this case reveal that defendant no. 1 is a public company listed on the Kuala Lumpur Stock Exchange. Defendant No. 1 had not enjoyed a sound economic health and was indeed at all material time undergoing a serious financial crisis. A board of directors meeting was held on 31 December 1998 ("the BOD meeting"). The plaintiffs did not attend the BOD meeting, while defendants no. 2 to 5 attended and passed, *inter alia*, the following resolutions:

1. That defendant no. 1 accept a RM5 million loan offered by defendant no. 2 who is both the deputy chairman and a director of defendant no. 1;

2. After observing that plaintiff no. 2 ie, Datuk Adlan Yeop bin Che Ros and Tan respectively had not attended the last ten and seven successive director's meetings, it was resolved that, in accordance with art. 91(g) of defendant no. 1's memorandum and articles of association, their office as directors of defendant no. 1 be vacated; and

3. That defendant no. 6 be appointed as a director and executive director of defendant no. 1 with immediate tffect.

Submission For Plaintiffs

It was submitted for the plaintiffs that the court ought not to be concerned with the merits of the matter at this interlocutory stage and that the court should instead ask if there is any serious question or questions to be tried.

It was said that the facts of the case are obviously in dispute, including eg, the contention that the BOD meeting was unlawful and irregular and that the minutes of the BOD meeting allegedly did not reflect the matters, discussed at the BOD meeting and so are unlawful.

It was further emphasised for the plaintiffs that the removal of plaintiff No. 2 and Tan had contravened s. 128(8) of the Companies Act 1965 and is therefore illegal. In addition, it was argued that the appointment of defendant no. 6 as a director of defendant no. 1 is null and void. Finally, it was canvassed for the plaintiffs that the balance of convenience is in favour of the plaintiffs and that there would be no prejudice to the defendants as defendant no. 1 can function normally until the matter is heard on its merits.

Contention For Defendants

In reply, it was contended, as a preliminary issue, for the defendants that the principles in *American Cyanamid Co. v. Ethicon Ltd* [1975] AC 396 cannot be relied upon because the interlocutory injunctive remedy sought by the plaintiffs would be equivalent to giving final judgment and would have the practical effect of putting an end to the trial without permitting the defendants to proceed to trial. For this purpose, reliance is placed on the decision of Abu Mansor, J (now FCJ) in *Leisure Farm Corp. Sdn Bhd v. Syarikat Kemajuan Kim Yon Sdn Bhd* [1990] 1 MLJ 44; *Cayne & Anor v. Global Natural Resources Plc* [1984] 1 All ER 225 CA; *NWL Ltd v. Wood; NWL Ltd v. Nelson & Anor* [1979] 3 All ER 614 HL; and *Cambridge Nutrition Ltd v. British Broadcasting Corp* [1990] 3 All ER 523 CA.

It was submitted for the defendants that the BOD meeting and the minutes were lawful and regular, and that plaintiff no. 2 and Tan were not removed, but their office as directors were deemed vacant by virtue of their successive absence from the directors' meetings, ten times in the case of plaintiff no. 2 and seven times in the case of Tan. Finally, it was stressed for the defendants that the appointment of defendant no. 6 as director is in accordance with art. 87 of defendant no. 1's memorandum and articles of association.

Decision Of The Court

Functions Of A Judge In Interlocutory Injuction

In *See Teow Chuan & Anor v. Yam Tunku Nadzaruddin Ibni Tuanku Jaafar & 4 Ors* [1999] 7 CLJ 195, in relation to the functions of a judge hearing an application for interlocutory injunction, I made the following observations:

The functions of a judge hearing an application for interlocutory injunction had been enunciated by the House of Lords in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396, and recently restated by the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah* [1995] 1 AMR 373, at pp. 390-391, as follows:

(a) He should ask himself whether the totality of the facts presented before him disclosed a *bona fide* serious issue to be tried. If he finds that no serious question is disclosed, the relief should be refused. If, however, he finds that there are serious questions to be tried, he should move on to the next step of his inquiry;

(b) Having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by the grant, against the harm that would result from its refusal; and

(c) The judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result between the date of the application and the trial proper and to maintain the *status quo*.

(See also *Interkol (M) Sdn Bhd v. Bandar Utama City Promenade Sdn Bhd & Anor* [1999] 5 CLJ 376, 380).

(a) Serious Questions To Be Tried

At this stage of the interlocutory application, I am mindful of the principle that the pleadings and evidence are incomplete and so I must refrain from making any determination on the merits of the claim or any defence to it. It is therefore not the function of the court to come to any specific finding of facts or any conclusion on the merits of the matter: *American Cyanamid Co v. Ethicon Ltd; Interkol (M) Sdn Bhd v. Bandar Utama City Promenade Sdn Bhd & Anor supra; Keet Gerald Francis Noel John v. Mohd Noor Bin Abdullah, supra.*

Having carefully perused and considered the plaintiffs' affidavits in support and the defendants' affidavits in reply, I am of the view that the following issues are *bona fide* serious questions to be tried:

(i) whether the BOD meeting was lawful or regular?

(ii) Whether plaintiff no. 2 and Tan were "removed" or whether their office as directors had fallen vacant and whether such removal or vacancy contravenes s. 128(8) of the Companies Act 1965?

(iii) Whether the appointment of defendant no. 6 was null and void?

(iv) Whether the minutes of the BOD meeting were not reflective of the meeting and so illegal?

Since there are numerous *bona fide* serious questions to be tried, it is necessary for me to move on to the next step of my enquiry ie, to consider the justice of the case.

(b) Justice Of The Case

Consideration in respect of the justice of the case would necessitate a careful and proper understanding of the cases cited by learned counsel for the defendants. It is therefore imperative for me to deal with these authorities and extract the relevant principles enunciated therein. Lord Diplock in *NWL v. Woods; NWL Ltd v. Nelson & Anor, supr*a explained at pp. 625-626 as follows:

> My Lords, when properly understood, there is in my view nothing in the decision of this House in *American Cyanamid Co v. Ethicon Ltd* to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply. *American Cyanamid Co v. Ethicon Ltd,* which enjoins the judge on an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial.
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> ...
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> Cases of this kind are exceptional, but when they do occur they bring into the balance of convenience an important additional element. In assessing whether what is compendiously called the balance of convenience lies in granting or refusing interlocutory injunction in actions between parties of undoubted solvency the judge is engaged in weighing the respective risks that injustice may result from his deciding one way rather than the other at a stage when the evidence is incomplete. On the one hand there is the risk that if the interlocutory injunction is refused but the plaintiff succeeds in establishing at the trial his legal right for the protection of which the injunction has been sought he may in the meantime have suffered harm and inconvenience for which an award of money can provide no adequate recompense. On the other hand there is the risk that if the interlocutory injunction is granted but the plaintiff fails at the trial the defendant may in the meantime have suffered harm and inconvenience which is similarly

> irrecompensable. The nature and degree of harm and inconvenience that are likely to be sustained in these two events by the defendant and the plaintiff respectively in consequence of the grant or the refusal of the injunction on one side or the other; and this is what I understand to be the thrust of the decision of this House in *American Cyanamid Co v. Ethicon Ltd.* Where, however the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

This House of Lords decision was followed by the English Court of Appeal in *Cayne and Another v. Global Natural Resources Plc, supra* at p. 225 in these words:

> Where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice, and to balance the risk of doing an injustice to either party. In such a case the court should bear in mind that to grant the injunction sought by the plaintiff would mean giving him judgment in the case against the defendant without permitting the defendant the right of trial. Accordingly, the established guidelines requiring the court to look at the balance of convenience when deciding whether to grant or refuse an interlocutory injunction do not apply in such a case, since, whatever the strengths of either side, the defendant should not be precluded by the grant of an interlocutory injunction from disputing the plaintiff's claim at a trial.

This restatement of the relevant principles by the English Court of Appeal in *Cayne and Another v. Global Natural Resources Plc, supra viz* the avoidance of injustice and the balancing the risk of doing an injustice to either party was followed by Abu Mansor J (now FCJ) in *Leisure Farm Corp Sdn Bhd v. Syarikat Kemajuan Kim Yon Sdn Bhd* [1990] 1 MLJ 44, 47.

The English Court of Appeal in *Cambridge Nutrition Ltd v. British Broadcasting Corp, supra,* in refusing to grant an interlocutory injunction held, *inter alia,* that the court should assess the relative strength of the parties' cases before deciding whether the injunction should be granted.

Having revisited the aforesaid four authorities, I am of the view that the relevant principles enunciated in the first three cases *viz*, *NWL Ltd supra*, *Cayne, supra* and *Leisure Farm, supra,* are entirely consistent with the principles which have in effect been crystallised by our Court of Appeal in *Keet Gerald Francis Noel John supra,* especially in relation to the consideration in respect of the practical realities of the situation and the avoidance of injustice. In other words, the court has to consider the justice of the case ie, the balance of justice and not just merely the balance of convenience. These authorities alluded to the primary function of a judge dealing with an application for an interlocutory injunction to consider, *inter alia,* an additional element ie, the risk of injustice and that in doing so the judge should do his best endeavour to avoid injustice.

The judge should go beyond a mere consideration of balance of convenience and have due regard to the balance of justice which is required by the justice of the case.

In the circumstances, I shall now proceed to consider the balance of justice as required by the justice of the case. The first item of the injunctive relief sought by the plaintiffs is intended to restrain defendants no. 2 to 6, whether by themselves, their servants etc. from commencing or proceeding with the BOD meeting on 29 April 1999 or on any other dates. The effect of such an injunctive relief is that defendants no. 2 to 6 who are directors of defendant No. 1 are not to conduct directors' meetings, unless a prior order of the court has been obtained. To my mind, this runs counter to all principles of company law and militates against the justice of the case. The injunction if granted would effectively grind to a complete halt defendant No. 1's lawful decision-making process pertaining to the operations and activities of defendant no. 1. The management and administration of defendant no. 1 would surely be stifled and stultified. Part V of the Companies Act 1965 provides for the management and administration of a company and division 2 thereof establishes, *inter alia,* the mechanism for the appointment of directors and their statutory duties. Although directors' meetings are not provided for in the Companies Act 1965, nevertheless the articles of association of a company such as defendant no. 1 do provide for the regulation of such meetings. Further, under s. 132 of the Companies Act 1965, directors are fiduciaries who must act in the best interest of the company. Directors can hardly be said to be able to act in the best interest of the company if a company such as defendant no. 1 is restrained by some directors from holding the BOD meeting or any other directors' meeting or meetings. An injunction in terms of the first prayer in the plaintiffs' application would constitute a spoke in the wheel of the company.

In the circumstances, the justice of the case is in favour of refusing the injunction so that defendant no. 1 and all the directors of defendant no. 1 would not be in breach or run foul of the articles of association of the company governing the holding and conduct of directors' meetings. Under s. 33(1) of the Companies Act 1965, subject to the Act, the articles, together with the memorandum, constitute a covenant among the members *inter se* and between the members and the company to observe all the provisions thereof. An aggrieved member of the company may therefore obtain an order from the court compelling compliance with or restraining contravention of the articles: *Salmon v. Quin & Axtents Ltd* [1909] AC 442.

Plaintiffs' second prayer purports to restrain defendant no. 6 from acting as a director of defendant no. 1. As at 31 December 1998, the BOD meeting has appointed defendant no. 6 as director as well as executive director. As stated above, whether this appointment is valid or otherwise is a *bona fide* serious question which would have to be resolved at the full trial of the suit herein. So far as the uncontroverted facts have revealed, it is clear that a vast majority of the directors of defendant no. 1 have agreed to the appointment. That being the case, the justice of the case would favour the preservation of the *status quo* which is the continued exercise by defendant no. 6 as a director of defendant no. 1. To grant the injunction would be to displace or disorientate the *status quo*, which is contrary to O. 29 of the Rules of the High Court 1980, which was enacted for the preservation or maintenance of the *status quo* and not otherwise.

The 3rd prayer sought by the plaintiffs is to restrain defendants no. 2 to 6 from excluding plaintiff no. 2 and Tan from acting as directors of defendant no. 1. It is an established fact that plaintiff no. 2 has not attended the last ten successive directors' meetings while Tan has not attended the last seven successive directors' meetings. Tan is not a party to this suit and he has not applied to this court for any injunctive relief. That being the case, it is neither necessary nor proper for this court to consider any injunctive relief in his favour. Our courts do not function as busy bodies and it has never been the business of our courts to give an order in favour of or against any person or persons who are non-parties or strangers to the cases before our courts.

In the case of plaintiff no. 2, it was argued that he has been removed as a director and that the removal is illegal in the light of s. 128(8) of the Companies Act 1965. It was canvassed for the defendants that plaintiff No. 2 has not been removed, but by virtue of plaintiff no. 2's absence from ten successive directors' meetings, his office shall be deemed vacant.

In my view, the intensity of plaintiff no. 2's interest as a director in defendant no. 1 can hardly be described as immense. His absence from ten successive directors' meetings no doubt has given rise to the irresistible inference that his interest in or concern for the affairs of defendant no. 1 as a company is sliding downhill, to a level which is lacklustre, lackadaisical or lukewarm. The facts and circumstances of the case are not favourable to plaintiff no. 2 but are instead negating the grant of the injunctive relief sought by him. It is therefore natural for defendant no. 1's BOD meeting to have resolved that the office of plaintiff no. 2 as a director of defendant no. 1 shall be deemed vacant and was indeed vacated. Whether this amounts to a removal or vacation of office or the removal or vacancy is in contravention of s. 128(8) is, as stated above, a *bona fide* serious question to be tried. However, the *status quo* is that plaintiff no. 2 is, for the time being with effect from 31 December 1998, no longer a director of defendant no. 1. As a general rule, this court has the jurisdiction to grant an injunction which is mandatory in substance ie, to reinstate him as a director of defendant no. 1. However, as an exception, this would alter the *status quo* rather than preserving it and so the court would be slow in granting it: *Thomas M. Heysek v. Boyden World Corp* [1989] 1 MLJ 219, 222.

There is then the question of delay on the part of plaintiff no. 2 in filing this application for injunctive relief after four months had elapsed ie, from the date of the BOD meeting on 31 December 1998 to the date of filing this application on 28 April 1999. This considerable delay in my view, attracts the application of the oft-quoted maxim ie, delay defeats equity.

Discretionary Remedy

Conspicuously, there has been no or no significant submission as to whether damages would be an adequate remedy here. That being the case, I can dispense with the endeavour to make a specific finding on this, except to say that the injunctive relief sought by the plaintiffs is discretionary and that such discretion should be exercised according to established judicial principles based on the facts and circumstances of this case.

Conclusion

Applying the foregoing established judicial principles to the facts and circumstances as alluded to above, I hereby dismiss the plaintiffs' application in encl. (3) with costs, but would order an early date for the hearing of the full suit herein.